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Constructing Investor Rights? Why Some States (Fail to) Terminate Bilateral Investment Treaties

Written by Julia Calvert
Career Development Fellow in International Political Economy
Politics and International Relations
School of Social and Political Science
University of Edinburgh

Abstract:

The hundreds of legal claims brought by foreign investors against states under bilateral investment treaties (BITs) have prompted growing public backlash. Yet governments are responding to this backlash differently. Some countries heavily targeted by investor claims have terminated BITs while others have sought only moderate reforms to key provisions. Despite the rich literature on BITs, we know little about the growing dissonance in government approaches toward investor rights: Why do some countries terminate BITs while others seek to reform them? This article explores the strategies governments used to defend public and political interests during investor-state disputes in Argentina and Ecuador. Governments in both cases adopted policies they knew were likely to infringe on investor rights and employed strategies to mitigate the costs of investor claims with some success. Variation in government approaches, namely Ecuador's decision to terminate BITs and Argentina's decision to maintain them, stems from ideological differences and state-society relations. Ideological differences, which reflect their social bases, caused policymakers to weigh the costs and benefits of BITs relative to domestic interests differently. This demonstrates that governments are not passive recipients of international rules, but instead will knowingly break with such rules where domestic interests are perceived to necessitate it.

Keywords: bilateral investment treaties, foreign investment, Argentina, Ecuador, constructivism

Word count: 12,061

Hundreds of legal claims have been brought against governments by foreign investors under bilateral investment treaties (BITs) since the 1990s, resulting in multi-million dollar fines imposed against governments found to have infringed on their agreements. Concerns that BITs bind government hands and lock governments into investor-friendly regulatory frameworks pervade the rich BIT literature (Chang 2004; Cho and Dubash 2005; Blackwood and McBride 2006; Gallagher 2008; Manger 2008; Van Harten 2008; Miles 2010; Yazbek 2010; Cutler 2013). However, while the mounting number of investor claims demonstrates the potential costs of BITs, it also suggests that BITs do not effectively constrain government action. Such a high number of claims would not exist if governments always adhered to BIT obligations. Moreover, resistance to investor claims is growing. Ecuador, Bolivia, Venezuela, India and South Africa terminated BITs after high profile disputes. Others countries, such as Argentina, Canada and European Union members are modifying key provisions in hopes of better protecting regulatory space in new BITs and mega-regional trade agreements. To the United Nations Conference of Trade and Development, these reform efforts signal a new era of 'reorientation' in the articulation of international investment law (UNCTAD 2015: 123).

Scholars have sought to explain why governments sign on to BITs given their potential costs (Guzman 1998; Elkins, Guzman and Simmons 2006; Simmons, Dobin and Garrett 2006; Tobin and Rose-Ackerman 2011; Allee and Peinhardt 2014; Simmons 2014). Economic competition, the coercive influence of capital-exporting states, and interest group pressure are among the factors often cited as driving BIT formulation. Yet, the rate of new BITs signed per year is declining. Scholars attribute this trend to governments' increased awareness of the potential costs of BITs (Jandyhala Henisz and

Mansfield 2011; Poulsen and Aisbett 2013). However, this does not adequately explain the dissonance in government attitudes: why do some governments heavily targeted by investor claims terminate BITs while others do not? Divergent responses to investor claims suggests that governments perceive the costs of BITs differently. While efforts to reform BITs capture growing attention (Spears 2010; Mysore and Vora 2016; Hildelang and Krajewski 2016), we know little about how mechanisms interact to inform different responses.

This article contributes to filling these gaps by examining how political ideology and state-society relations shape government approaches towards BITs. Governments are not passive recipients of international rules, but instead will knowingly break with such rules where domestic interests are perceived to necessitate it. Interest group pressure, domestic economic performance, global power politics and investor claims influence government attitudes towards investor rights. Yet the importance policymakers assign to these factors relative to public and political interests will vary according to policymakers' normative beliefs and state-society relations. Governments more tolerant of the principles that underpin BITs will be more likely to accept their potential costs over time, particularly in the absence of civil society contestation. Governments who contest such principles will be less tolerant of such costs and more susceptible to calls for policies that challenge investor treaty rights. Decisions to follow or infringe, and terminate or formulate BITs must be understood as a product of policymaker perceptions, which are in part subjective, as opposed to purely rationalist calculations. Current efforts to reform BITs reflect a weakening of support for the international standards that informed their proliferation in the 1990s. These reform efforts maybe expanded or reversed by further changes in the normative bases upon which BITs rely.

I illustrate this argument with a comparative case study analysis of Argentina and Ecuador's approach to BITs after investor claims. These case studies are informed by an extensive analysis of legal transcripts and interviews with public officials, international lawyers and civil society representatives. Most studies of BIT formulation utilize cross-national analyses aimed at exposing the correlation between potential causal mechanisms and trends in BIT signings. Comparing case studies enables me to build on these insights by exploring more deeply how these mechanisms (interest group pressure, domestic economic performance, global power politics and investor claims) interact with officials' normative beliefs to shape orientations towards BITs over time.

Argentina and Ecuador are among the most frequently litigated countries under BITs. I focus on Argentina's disputes with water companies and Ecuador's disputes with oil companies, which represent the largest grouping by sector of investor claims in each country.[i] These claims drew strong public opposition and played out at a time when their domestic economies were recovering from drastic economic downturns. Yet the governments in power at the height of the disputes responded to investor claims differently. In Ecuador, the Correa administration (2006 to 2016) terminated BITs and withdrew from the International Centre for the Settlement of Investment Disputes (ICSID), the world's most prominent investor-state dispute settlement (ISDS) body. In Argentina, the Kirchner governments (2003 – 2015) used political pressures to incent foreign investors to drop claims under the parameters of existing rules. Their responses to investor claims may appear unrepresentative as some governments continue to advance stringent BITs. Yet their approaches reflect a growing trend of government and civil society resistance to investor claims. Moreover, although both the Correa and Kirchner governments subscribed to a left-leaning political ideology, they demonstrated important ideological differences, which had a significant impact on their approaches. As such, the cases offer the opportunity to examine how changes in domestic conditions, and in particular government ideology, influence BIT compliance.

Despite being affiliated with the 'pink tide' of left-leaning governments that swept to power in Latin America during the early 2000s (Escobar 2010; Levitsky and Roberts 2011), the Kirchner and Correa administrations differ ideologically. The Kirchner administrations contested neoliberalism discursively, but were tolerant of neoliberal principles in practice (Wylde 2011 and 2016). Officials objected to ISDS, but perceived of BITs as necessary and legitimate tools to attract and retain foreign investment despite investor claims, civil society opposition and strong economic recovery following the 2001 crisis. The Correa administration subscribed to a more ardent leftist political ideology, promising to recapture state sovereignty and install '21st Century Socialism' (Conaghan 2008). Political officials perceived of BITs as an illegitimate constraint on policy autonomy. As such, officials were more receptive to demands for a curtailment of investor rights and more willing to take on the costs of terminating BITs in terms of capital flight and relations with home-states. Variation in ideology, therefore, played an important role in shaping the countries' divergent responses.

This study enhances understandings of BIT formulation in three ways. First, it helps account for recent trends by better explaining why governments heavily targeted by investor claims react differently. Public opposition to investor rights is growing in developed and developing countries, however this study demonstrates that political ideology may foster a conducive environment or close opportunities for such dissent. Second, it demonstrates that BITs do not constrain government action consistently across contexts. In both cases, governments introduced policies they knew were likely to prompt investor claims. BITs raised the cost of pursuing these policies, but governments adopted defense strategies that mitigated these costs to some degree. They also sought new intraregional alliances and strengthened ties with alternative economic partners to counteract the effects of sanctions imposed by investors' home-states. This suggests that externally imposed constraints may induce governments to experiment with policies in ways they otherwise may not have. Lastly, it helps us better understand governments' bargaining power vis-à-vis foreign investors under BITs. In both cases, bargaining power was strengthened by the popularity of elected officials and strong economic recovery, which contributed to the success of defense strategies.

In the next section, I discuss existing literature on BIT formulation and problematize the portrayal of governments as purely rationalist, utility-maximizing agents. I then propose an alternative theoretical framework that recognizes the socially constructed and contingent nature of investor rights and the role normative beliefs play in shaping perceptions of BIT obligations. In subsequent sections I discuss the cases of Ecuador and Argentina and contrast each country's experience to assess how political ideology shapes governments' unique orientations towards BITs.

Ideology and Investment Rules

International standards on the treatment of foreign investment were contested and unstable prior to the 1980s. Western European countries and the United States sought to protect the property and profit-making of their nationals abroad by enshrining principles on investment protection in customary international law. Most notably, this included the right to intervene where foreign assets were nationalized by local governments. However, newly independent countries in Latin America, and then Africa and Asia, asserted their right to decide freely over domestic economic policy, including the right to expropriate foreign-owned assets (Subedi 2012: 8; Ghouri 2011: 191; Miles 2013). The standards championed by capital-exporting countries were therefore curtailed and subject to disagreement when put into practice. Western European countries began to advance what became the world's first BITs with former colonies in the 1950s and 1960s to secure agreement on a limited number of investment protections. At the same time, the World Bank sought to define a role for itself in international investment law with the establishment of ICSID. ICSID was meant to provide a neutral and apolitical venue where foreign investors could bring claims unilaterally against their hosts and avoid the trouble associated with convincing their home governments to take up a claim on their behalf (Subedi 2012: 95). The United States, however, continued to insist that foreign investment was protected under customary international law and pursued only a handful of Friendship, Commerce and Navigation treaties that addressed investment in broad strokes. It was not until the 1980s that the United States adopted its first BIT program (Ghouri 2011; Pauwelyn 2005).

The steady internationalization of domestic economies in the 1970s and 1980s leant greater impetus to the push for stringent investment protections. The rise of neoliberalism as the dominant policy paradigm in the global political economy and efforts to restructure developing country economies according to neoliberal prescriptions created a receptive environment for stronger investment rules. Lauded as an efficient means to attract foreign investment at a time when competition for foreign capital rose steadily, BITs became a pillar of development strategies in developing countries. Meanwhile, the United States became a powerful voice in the championing of multilateral investment rules. Yet, efforts to negotiate a multilateral agreement on investment twice failed, halted by influential developing countries that feared the standards insisted upon by capital-exporting countries would reduce their ability to promote substantive development (Pauwelyn 2005). As a result, capital-exporting countries ramped up efforts to secure BITs. While only 385 agreements were in force in 1990s, currently there exists more than 3300 (Tobin and Rose-Ackerman 2011: 3; UNCTAD 2017a: 111).

Although no two are the same, most BITs signed in this period contained more stringent standards on the entry and exit, treatment and expropriation of foreign investment than previous agreements. More controversial are the ISDS provisions commonly included in this generation of agreements. Earlier BITs and customary international law placed upon states the burden of defending their nationals' foreign assets through state-state dispute settlement; a cumbersome process that left many aggrieved foreign investors unsatisfied (Vandevelde 2005: 160). ISDS provisions give foreign investors the capacity to sue their hosts through ICSID or any of the regional arbitration centers recognized under the United Nations Centre for Trade and Investment Law (UNCITRAL) arbitration rules. ISDS provisions were sold to governments as a technical and efficient means to avoid the political fallout that resulted from state-state dispute settlement (Pauwelyn 2005: 26 – 28). In the last two decades, governments have become increasingly aware of the costs of consenting to such provisions. While only 25 disputes were brought to ICSID until the 1990s, more than 767 known claims have been brought against governments by the end of 2016, most of which to ICSID (Pauwelyn 2005: 30; UNCTAD 2017a: 115).

Scholars have sought to explain why governments rushed to the more stringent BITs in the 1990s (Guzman 1998; Tobin and Rose-Ackerman 2011; Allee and Peinhardt 2014; Simmons 2014; Elkins, Guzman and Simmons 2006; Simmons, Dobin and Garrett 2006). The desire to signal credible commitments to investor-friendly policies, the coercive pressures of capital-exporting countries, domestic interest group pressure, economic competition, and declining economic performance have all been cited as driving BIT formulation. Yet the realist and rationalist assumptions that dominate most studies ignore the constructed qualities of investment rules. A growing number of BITs have been signed between capital poor, developing countries since the mid-1990s that reflect the standards championed by developed countries. This suggests that some developing countries have internalized these standards and integrated them into their own BIT programs. Indeed, as Jandhyala, Henisz and Mansfield (2011) observe, this trend reflects a growing tendency for governments to view BITs as an appropriate act, irrespective of pressure from a potential foreign investor or its government. This suggests the consolidation of a global norm regarding the treatment of foreign investment by host-countries.

However, while the number of south-south BITs has grown, the overall rate of new BITs signed per year has declined since 2002 (UNCTAD 2017a: 111). Jandyhala, Henisz and Mansfield (2011) attribute this decline to investor claims, which increased awareness of the potential costs of BITs. The normative influence of BITs has waned and governments are now returning to a more rational cost / benefit analysis in their approach to BITs. Similarly, Poulsen and Aisbet (2013: 274) argue that BIT claims "led to spatially and temporally dispersed arrival of important information about the potential costs of BITs", causing policymakers to re-evaluate and slow down their BIT participation. This assumes that governments were not fully aware of the risks of investor claims and, as rational actors, limit their exposure to such costs after being directly targeted by a claim. Governments that have not experienced claims are likely to continue signing BITs because, as narcissistic actors, governments focus less on what happens to their neighbours (Poulsen and Aisbet 2013). This does not explain why governments heavily targeted by investor claims react to them differently. Indeed, the dissonance in government approaches suggests that governments perceive the costs versus benefits of BITs differently. Moreover, while existing studies identify mechanisms that drive BIT formulation, they do not adequately specify the conditions under which one or more mechanism matters over time and how these mechanisms interact to shape government orientations. Better explaining why some governments contest BITs while others sign on to them requires exploring how these mechanisms fluctuate to shape policymaker perceptions of IIAs over time.

Perceptions are shaped by two kinds of ideas: core / normative believes and the more malleable framing processes (or causal beliefs) that inform actors' understandings of the world around them. Both kinds of ideas evolve over time, but causal beliefs evolve most rapidly depending on actor's experiences and interactions (Schmidt 2008; Béland 2009). Poulsen and Aisbett (2013) illustrate the importance of changes in policymakers' causal ideas regarding the perceived costs versus benefits attributable to BITs. Yet, they ignore the role of normative beliefs play in shaping how governments perceive these costs in the policymaking process. Normative ideas shape policymaking in various ways, for instance, by helping to define what issues policymakers see as relevant, how they assign importance to competing issues, the goals they set out for themselves, and how they choose between the range of instruments that can be used to attain them (Béland 2009: 704 – 705). Ideological differences, therefore, may cause variation in policymaker orientations towards BITs in several ways, for instance, by altering the importance policymakers assign to BIT obligations relative to civil society demands, the extent to which they believe BIT are a necessary and legitimate tool to attract foreign investment, and how they balance investor rights with the pursuit of other policy goals. Indeed, international legal scholars have long recognized the importance of normative beliefs in shaping government behaviour towards international law (Franck 1995). In the next sections, I examine how governments in Ecuador and Argentina responded to investor claims and how their approach to BITs varied over time according to shifts in governments' political ideology, state-society relations and domestic economic performance.

Argentina and Selective Adherence to International Investment Law

Argentina has faced the greatest number of investor claims out of any country in the world. Most claims were prompted by emergency measures the government adopted to placate the symptoms of the 2001 economic crisis, which altered the neoliberal regulatory framework fashioned by Carlos Menem in the 1990s. These claims demonstrate the high costs of infringing on BITs. However, as this section demonstrates, civil society demands for affordable access to basic services, strong domestic economic performance, the declining influence of business elites and the government's political ideology mediated the influence BITs had on government action and informed government responses to investor claims thereafter. Yet, despite calls from left-leaning legislators and civil society, the Kirchners refused to terminate BITs. While state officials objected to ICSID, they believed BITs were a legitimate means to attract investment despite their potential costs. Thus, normative beliefs limited how far the government was willing to go to challenge investor rights.

Following the hyperinflationary crisis of the 1980s, the government of Carlos Menem (elected in 1989) adopted sweeping neoliberal reforms aimed at privatizing state-owned enterprises (SOEs), reducing state-related employment, welfare system reform and economic liberalization (Villalón 2006; Di Tella 1990). Menem's goal was to draw foreign investment into telecommunications, transportation, power and water and sanitation sectors to reduce state spending and improve deteriorated infrastructure. Crucial to the privatization project was the 1991 Currency Convertibility Plan, which pegged the Argentine peso to the US dollar to overcome inflation and give confidence to foreign investors (Haselip and Potter 2010: 1168). 55 BITs were brought into force to signal the country's commitment to liberal economic policy. Provincial governments were also pushed to privatize services however only 14 of 23 provinces and the autonomous city of Buenos Aires privatized electricity distribution systems while 13 privatized urban water and sanitation systems (Post and Murillo 2013: 117-118). Nevertheless, the sale of state assets generated capital receipts amounting to US$ 18 billion by 1993 (Rodriguez-Boetsch 2005: 302). The first years of neoliberal adjustment (1990-1994) were therefore deemed a success as the annual average growth rate reached 7.7 percent (Haselip 2005: 78; Villalón 2006: 140).

Pressure from international financial institutions and a desire to establish his neoliberal credentials motivated Menem to rush the privatization process. Contracts with foreign investors were designed to attract rapid investment with generous terms that limited government regulatory powers (Stanley 2006). Little effort was given to maintaining effective and independent regulatory agencies, which became subject to competing demands (Gerchunoff and Cánovas 1996; Post and Murillo 2013). Investors insisted on tariff increases to fund service expansion and upgrades while provincial officials, at the behest of civil society groups, ordered rate freezes and stiff penalties for firms that failed to meet service upgrade schedules. Many investors reduced operating costs with cuts to their labor force, creating a massive pool of unemployed persons that fed social opposition. The privatization process was therefore heavily politicized and seen as concentrating wealth in the hands of rent-seeking firms (Rodriguez-Boetsch 2005: 306).

In this tense political environment Argentina faced its first investor claims, prompted by disputes between investors and provincial authorities. Privatized water companies, France-based Vivendi and US-based Azurix, brought claims after provincial governments blocked rate increases and imposed fines. Consumer groups accused the companies of failing to meet community needs and providing contaminated water. Activists led street demonstrations and boycotted bill payments. Energy firms also brought claims in protest of the introduction of stamp taxes in some provinces. Additional claims were brought by Lanco International and Siemens after the cancellation of their contracts with the national government. Siemens, however, withdrew its claim after the US Securities and Exchange Commission published a report in which the company admitted to bribing officials to obtain its original contract (Torterola and Gosis 2012: 18).

Argentine officials were unprepared to address the claims. Few state lawyers had experience in international arbitration or an intimate knowledge of the BITs. The state was first represented by the Ministry of Foreign Affairs and international law firms with expertise in commercial arbitration. The Procuración del Tesoro de la Nación (Office of the Attorney General, PTN) then established an in-house team of internationally trained lawyers that assumed lead of the cases in 2000.[ii] Most claims were settled and, as such, did not meet the final stages. However, two awards rendered in favor of Azurix and Vivendi, including a US$ 165 million and US$ 105 million award respectively, served as early warning signs of the potential costs BITs posed.

Toward the end of the 1990s, a series of external shocks led to rapidly deteriorating economic conditions (cf. Rodriguez-Boetsch 2005). The country's current-account deficit leapt from US$ 6.8 billion in 1996 to US$ 14.5 billion in 1998. Output plummeted and GDP fell, peaking in 2002 at a ten percent contraction (Wylde 2011: 437). The poverty rate more than doubled from 27.1 to 54.7 percent while those living in extreme poverty more than tripled (IMF 2005: 24). In 1999, Fernando de la Rúa assumed presidency and abided by the International Monetary Fund's (IMF) recommendations to raise taxes, further cut government spending and institute labor market flexibilization laws (Rodríguez-Boetsch 2005: 308). This contradicted his electoral promises to reverse neoliberal orthodoxy and demonstrated the influence the international financial community retained over government decision-making. Calls from labor and the middle class for progressive change grew stronger and new forms of social mobilization, including the *piqueteros* (picketers) movement consisting of unemployed persons and their families, channeled their dissatisfaction through street and highway blockades (Vila 2006: 169).

In December 2001, street demonstrations in city centers and widespread looting in Buenos Aires forced de la Rúa to resign. Argentina then cycled through three presidents until Congress appointed Eduardo Duhalde. Under Duhalde, officials recognized that a drastic solution was needed to quell unrest and tackle deficit problems. A currency devaluation was perceived as necessary to restore the competitiveness of Argentine exports (Rodriguez-Boetsch 2005: 308). In January 2002, Congress introduced emergency measures (Law 25.562) that froze deregulated utility rates and ended the Convertibility Plan. The peso devalued, temporarily stabilizing at a rate of three pesos to the US dollar. The measures also eliminated the right of utilities owners to calculate tariffs in dollars and converted tariffs to a fixed peso rate, which significantly reduced the value of contracts, licenses and concessions with dollar adjustment features. This was accompanied by the largest debt default in history (Post and Murillo 2013; Stanley 2006).

Officials knew the emergency measures would negatively impact foreign investors and were aware of the rights BITs afforded them because the pre-crisis claims.

However, the terms of investors' original contracts were perceived to be no longer viable due to the severe strain they placed on users' budgets whose incomes had also devalued. The growing mobilization of the unemployed and poor combined with de la Rúa's ousting demonstrated the growing political clout of marginalized sectors. Maintaining affordable access to basic services therefore outweighed investors' property rights in government decision making.

Foreign investors were hit with severe financial losses since their debt remained nominated in dollars (Vicien-Milburn and Andreeva 2010: 295). Investors demanded tariffs increases and new user fees to stay afloat. Most provincial governments and the national government refused as it risked social unrest. The government offered investors two options: renegotiate tariffs or continue with the existing tariff system (Stanley 2006: 7). In February 2002, the Commission for the Renegotiation of Concession Contracts (CRCC) was established to renegotiate contracts. Provincial governments undertook similar renegotiations with investors in their jurisdiction. Some investors rejected the process and filed an arbitral claim. Approximately 45 claims were brought against Argentina, all but four of which were convened under ICSID. Nine claims involved water and sanitation services and 20 involved electricity and gas distribution. Investors alleged that the impacts of the emergency measures constituted breaches of BIT provisions on fair and equitable treatment, full security and protection and expropriation. Most investors, however, filed claims primarily to enhance their bargaining position during contract renegotiations.[iii] Such claims galvanized public opposition, leading to calls from civil society groups and opposing legislators for a cancellation of BITs.

When Néstor Kirchner took office in 2003, the government adopted a strict stance toward foreign investors. Kirchner replaced the CCRC with the Public Service Contract and Renegotiation Unit whose objective was to incent investors to drop their claims with the promise of new contracts. Some investors suspended their claims to signal their willingness to negotiate.[iv] This included investors with interests in continuing their operations and who stood to gain more from settlement in the long run. Minority shareholders and owners of companies that already exited Argentina were more inclined to maintain their claims (Mortimore and Stanley 2006).

Kirchner's election represented a degree of political renewal. Kirchner aimed to break Argentina's historic susceptibility to macroeconomic instability while redistributing wealth and renewing state alliances with labor and business. Kirchner expanded a conditional cash transfer program instituted by Duhalde called *Plan Jefes y Jefas de Hogar* with the *PlanesTrabajar* and *Plan Familias*. He also instituted progressive labor policies and introduced industrial and macroeconomic policies to strengthen economic growth. This included public works programs, selective protective tariffs and subsidies, and additional credit for small and medium-sized businesses. Central to macroeconomic policy was the *Stable and Competitive Real Exchange Rate*, which facilitated a boom in exports and sustained fiscal surpluses. This helped swell government coffers in the presence of export taxes and record high international commodity prices (Wylde 2016: 332 – 334). Kirchner also strengthened relations with alternative economic partners, including China and Iran, to expand access to foreign capital. In 2004, President Hu of China committed to investing $20 billion in Argentina, most of which targeted the country's energy and transportation industries (Paz 2014: 8).

Within a year of Kirchner's election, the economy began to rebound. Kirchner diverted financial resources towards paying off international creditors, including the IMF, which he saw as imposing unreasonable constraints on the country's policy autonomy (Grugel and Riggirozzi 2007: 99). Kirchner also undertook a debt restructuring process, securing an agreement with 70 to 75 percent of sovereign bondholders with a significant cut to the bonds' value (Kuegal 2013). Kirchner's refusal to settle with holdouts meant the country could no longer issue bond abroad, limiting the country's access to international credit markets. However, the economy continued to perform well. Kirchner funded the expansion of provincial infrastructure projects and began renationalizing public services, reducing dependencies on foreign investment and filling gaps where investors exited the market (Post and Murillo 2013: 122). Major concessions in the water and sanitation sector were rescinded, including those with Suez, Enron, Saur and Vivendi who had cases pending before ICSID. By May 2006, the proportion of the population serviced by SOEs in the water sector grew from 12 percent to 57 percent (Azpiazu and Bonofiglio 2006: 36). Yet, as Christopher Wylde (2016: 334) notes,

> This all occurred under a broad acceptance of core neoliberal principles – the importance of conservative fiscal policy and budget surpluses, steady inflation, an awareness of inefficiencies associated with many forms of state intervention and state ownership, the acceptance of primacy of the market in setting prices, the abandonment of economic protectionism in favour of at least relative economic opening and regional integration, and – albeit cautious and selective – welcoming of foreign direct investment.

Thus, ideologically, Kirchner did not reject neoliberal precepts but sought to balance them by renewing the state's regulatory role and softening its impacts on the poor.

Argentina's economic recovery made it easier to settle with foreign investors. Higher revenue from industrial sales cross-subsidized services for residential clients. In some cases, national and provincial governments allowed firms to raise rates charged to wealthy and industrial users in exchange for commitments to keep rates low for poorer sectors and withdrawing arbitral claims (Post and Murillo 2013: 124). Suez and Aguas de Barcelona, for instance, withdrew its US$ 105 million ICSID claim after agreeing with the province of Cordoba to a rate increase of 20 to 50 percent for medium-income neighborhoods and up to 100 percent for the wealthiest sectors while rates for poorer households were kept low (Brundell 2005; Olivera 2005). In total, 19 investor claims prompted by the crisis were settled, including 13 in the utilities sector.

Where contract renegotiations failed, Kirchner employed legal strategies to defend the emergency measures. Central to the PTN's strategy was the state of necessity defense provided for under most BITs and customary international law. This defense exempts actions taken by states in response to extraordinary circumstances from the substantive protection of the treaties (Thjoernelund 2009). State lawyers argued that the measures were necessary to address the crisis and that investors must bear part of the adjustment burden as domestic investors had done. Such measures ensured impoverished citizens access to clean water according to the government's human rights obligations. Arbitral tribunals responded inconsistently. According to Peterson (2012), arbitrators rejected Argentina's necessity defense unanimously in five cases (CMS, Sempra, Enron, BG and National Grid), by a two to one majority in three cases (Suez, Impreglio and El

Paso) and accepted the defense to some extent in three cases (LG&E, Continental Casualty and Total). The necessity defense was therefore only marginally successful. Where cases reached a final ruling, foreign investors were more likely to win out; 19 concluded cases were rendered in favor of investors and only four in favor of the state.

Argentina sought annulment on all awards rendered against it. There is no appellate body through which ICSID awards are reviewed. Rather, Article 53 of the ICSID convention makes possible the stay of an award's enforcement to allow parties to request interpretations of IIA provisions, a revision to the award or annulment. Article 52, moreover, restricts the grounds on which parties can seek annulments to flaws in arbitral procedures (Lin 2012: 4). This means that awards can only be revised on narrow grounds. Over time, however, the PTN proved increasingly effective in annulment proceedings. Three of the five cases in which arbitrators unanimously rejected Argentina's necessity defense were annulled, including a US$ 106 million award in favor of Enron (Peterson 2012). Multiple investor claims therefore improved the government's capacity in legal defense over time.

Where annulment failed, Kirchner refused to pay investors' awards unless they were reviewed by Argentine courts. It was assumed when ICSID was established that states would voluntarily comply with rulings as the costs of non-compliance, in terms of the state's international reputation and the threat of economic sanctions, were considered enough to incent good behavior (Lin 2012). However, government officials were deeply skeptical of ICSID and believed the institution to be biased towards corporate interests.[v] Officials criticized the lack of transparency and the process by which arbitrators are selected. Paying ICSID awards was perceived to validate unfair rulings. Argentina's

Minister of Justice Horacio Rosatti, moreover, rejected the notion that ICSID decisions should be given primacy over Argentina's constitution and claimed they needed to be reviewed by Argentine courts for compatibility at the investor's expense (Goodman 2007: 479). Argentina withheld payment on five awards after investors refused to submit them to Argentine courts for review.

The election of Cristina Fernández de Kirchner in 2007 brought continuity to Argentina's development strategy and, to some extent, the country's relations with foreign investors. Another round of debt restructuring in 2010 secured an agreement for the repayment of all but 7 percent of the remaining bonds at 30 percent of their value. The remaining holdouts, however, pursued legal action in New York courts, continuing Argentina's isolation from international capital markets (Kuegal 2013). Kirchner's refusal to settle with the holdouts continued her popular support. Her popularity combined with Argentina's economic recovery provided a basis on which Kirchner could further challenge foreign investors. Indeed, despite mounting investor claims, Kirchner nationalized industries deemed to be of national importance. This included two airlines Aerolineas Argentina and Austral-Cielos del Sur S. A., effectively nationalized by Congress in 2008, and 51 percent of shares in Yacimientos Petroliferos Fiscales (YPF) expropriated in 2012. The former prompted claims by Spanish companies Teinver, Transportes de Cercanías and Autobuses Urbanos del Sur and the latter by Repsol.

Toward the end of 2010, the economy showed signs of decline, contracting 1 percent in 2011 (IMF 2017). In 2012, the United States suspended Argentina's preferential trade status and blocked its access to World Bank loans in response to the refusal to pay US investors (Fox and Rosenberg 2013: 56). Argentina's declining economic fortunes coincided with a more conciliatory approach towards some foreign investors. In 2013, Kirchner agreed to pay five outstanding arbitral awards. Payment, however, was in the form of government bonds at approximately 75 percent of their face value (Kiguel 2013). The deal reduced the final sum owed and enabled Kirchner to escape immediate payment. Kirchner's decision to negotiate likely resulted from the need to improve relations with the international community and domestic business who feared the government was driving away needed foreign capital. Indeed, the maintenance of capital controls and introduction of new export taxes drew opposition from the middle class and business. Having recovered from the crisis, internationally-oriented business elites pressed for economic liberalization. Kirchner persisted in her refusal to settle with bond holdouts however her popularity steadily eroded, culminating in her loss to the centre-right Republican Proposal candidate Mauricio Macri in the 2015 elections.

It is important to note that despite their combative rhetoric, the Kirchners did not terminate BITs or withdraw from ICSID. Many officials believed BITs help attract foreign capital and the potential costs of terminating them.[vi] Instead, they placed a hold on signing BITs to re-evaluate future terms. Argentina also joined efforts to establish an alternative arbitration center under the auspices of the Unión de Naciones Suramericanas (UNASUR). The UNASUR arbitration center is intended to establish rules that enhance the transparency of ISDS proceedings, grant greater recognition to state interests, and construct an appellate mechanism for the review of awards.[vii] However, whether the center will reach its final stages is questionable. Under Macri's leadership, Argentina is deepening its commitments to foreign investors despite its long history of protracted legal battles. Macri promised to renew the state's relationship with the international financial community and has taken measures to liberalize the domestic investment market, for example, by eliminating capital controls and reducing export tariffs. Macri also signed new BITs with Qatar and Japan that contain traditional ISDS provisions and grant prior consent to ICSID with few modifications aimed at curtailing investor rights.

Overall, 19 claims of the crisis claims were settled, most with new pro-poor contracts. Annulment proceedings used to overturn prior rulings with revisions to the state's necessity defense helped reduce the amount owed to investors before taxes and legal fees by $420 million.[viii] While the Kirchners' refusal to pay arbitral awards was believed by many to be an affront to the enforcement system, officials rejected the notion that they broke any laws. Asserting domestic jurisdiction over ICSID awards was perceived to be a means of balancing out the corporate bias in the arbitration system. However, this did come at significant costs in terms of the country's relations with traditional partners and access to foreign capital. The Kirchners' hesitancy to terminate BITs demonstrates limitations in how far they were willing to go to shield domestic interests from the potential costs of BITs. As demonstrated in the next case, countries that have faced fewer investor claims terminated existing agreements.

Ecuador and Big Oil: Mobilizing Opposition for Withdrawal

23 known investor claims have been brought against Ecuador, the most politicized and costly of which involve foreign oil companies. Most disputes with oil companies stemmed from successive attempts to extend government control over the oil sector after a massive privatization process in the 1990s. As this section demonstrates, these policies were prompted by civil society demands for greater benefits from oil

production and the need to refill government coffers drained by an economic collapse. Once Rafael Correa came to power and the economy regained strength, the government leveraged social opposition to foreign oil companies to terminate BITs.

Since 1971, oil exploration and exploitation remained under government control via Petroecuador. In the 1990s, Ecuador liberalized its hydrocarbons sector by modifying the oil contract system to increase incentives for foreign investment. Under the previous service contract model, Petroecuador assumed the costs of oil exploration and production and contracted out limited duties to private companies. This scheme offered minimal profits to private companies and attracted limited foreign investment. New production-sharing contracts, however, gave some of the risk of oil exploration and extraction to companies in exchange for a share in the oil produced. Foreign investment in the oil sector increased rapidly from US$ 90 million in 1991 to $ 1,120 million in 2001. Known reserves also increased markedly, from 2,115 billion barrels in the mid 1990s to 4,630 billion by 2004 (Stanley 2008: 5 – 7).

The new contracts were deemed a success, however, the sale of natural resources to foreign companies was heavily politicized. Profits from oil production flowed out of the country as poverty rates persisted. At the same time, indigenous organizing surged, driven by a renewed sense of political identity and opposition to neoliberal reforms. Indigenous groups were joined by environmental activists as the most vocal critics of neoliberal policy, which included oil sector privatization. Activists mobilized against instances of land appropriation, the detrimental health impacts, and the marginalization of indigenous livelihoods resulting from the entry and expansion of foreign oil companies (Perreault and Valdivia 2009). It is important to note, however, that most activists demanded greater benefits and stronger oversight to minimize environmental damage and were not opposed to oil extraction in principle.

A grave economic crisis in the late 1990s led to political instability and exacerbated social unrest. By 1999, Ecuador faced severe monetary instability with hyperinflation, capital flight and a mounting debt burden. The government under President Jamil Mahuad, a formally educated social democrat, 'dollarized' the economy to restore investor confidence and avoid hyperinflation. Mahuad hoped the move would also restore his political appeal, however, he was deposed in January 2000 after an indigenous uprising took over parliamentary buildings with the help of military factions. His Vice President, Gustavo Naboa, was sworn in (Beckerman and Solimano 2001: 2-3). Under Naboa, the government renegotiated its debt burden and adopted measures to improve tax collection. The country's fiscal accounts drastically improved, even achieving a small surplus in 2000 (Ibid: 3).

It was in this context that the government began re-evaluating concessions given to foreign oil companies. In August 2001, Ecuador's tax authority announced that oil companies would no longer receive reimbursements on value added tax (VAT). Oil companies received VAT reimbursements paid for goods and services used in the production of oil for export. However, the economic crisis created new demands for regulatory changes that would replenish government coffers. The government claimed that VAT credits had been granted in error and withheld almost US$ 200 million in anticipated reimbursements. Companies were also ordered to repay credits previously granted. A handful of companies refused, including US-based Occidental and Canadian company EnCana who brought BIT claims in response. The companies accused Ecuador of violating BIT provisions on expropriation, national treatment, fair and equitable treatment and full protection and security.

The VAT disputes were among the first BIT claims brought against Ecuador. Like Argentina, Ecuadorian officials were largely inexperienced in international arbitration and unfamiliar with the terms of the BITs.[ix] A team was quickly established under the Procuraduria General del Estado (PGE, Attorney General) to oversee the state's legal defense, however, it worked closely with international law firms based in the United States and United Kingdom that developed the legal strategy.[x] In this way, the government avoided the steep learning curve experienced by Argentina's legal team. The PGE was instructed to pursue all avenues available to have the claims dismissed, annulled or withdrawn.[xi] State attorneys argued that the VAT disputes pertained to the state's right to tax and were more appropriately resolved in domestic courts. Most BITs contain provisions that exempt matters of taxation from treaty coverage, subject to specified exceptions. Arbitrators, however, responded inconsistently.

The arbitral tribunal overseeing Occidental's claim found Ecuador liable for failing to provide a transparent and predictable framework for planning and for discriminatory treatment because the government continued to provide VAT credits to other export sectors.[xii] The tribunal overseeing Encana's claim, however, held that 'in the absence of a specific commitment from the host-state, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change.'[xiii] They also found Ecuador's refusal to issue VAT refunds did not amount to expropriation given that Encana was free to pursue damages in domestic courts and continued to profit from its operations. While Encana's claim was dismissed, Occidental was awarded US$ 75 million in a heavily publicized ruling that prompted public backlash.

In response, the Attorney General audited Occidental's activities. The audit revealed that Occidental had breached its concession contract and the national Hydrocarbons Law by selling off 40 percent of its stake without proper ministerial authorization. He then called for the termination of Occidental's contract. Indigenous and environmental groups, joined by middle class activists and then-presidential candidate Rafael Correa, occupied the streets of Quito in demand of Occidental's ousting. During a major strike in June, the Minister of Energy and Mines signed a resolution committing to 'undertaking all of the necessary steps for the departure from Ecuador of the companies Occidental…for having violated the juridical norms of the country.'[xiv] Activists and nationalist legislators then threatened to impeach then-President Alfred Palacio after the Minister announced he was considering a settlement. Only then was the contract formally terminated and Occidental's assets expropriated, a direct response to the demands of civil society. Occidental responded with a second arbitral claim referencing the social mobilization as evidence of the government's politically-motivated, and hence discriminatory treatment.

As the Occidental dispute unraveled, a boom in oil prices led to soaring production and a sharp increase in crude exports. By 2005, oil prices had more than tripled and continued to rise. Civil society demands for greater benefits from oil extraction grew in urgency. Despite their awareness of the protection BITs afforded them, the Palacio government initiated an audit of oil contracts, which concluded that private oil companies earned extraordinary profits. Palacio then announced that oil contracts would have to be renegotiated.[xv] The following year, Congress amended the

Hydrocarbons Law (No. 2006-42) and placed a 50 percent tax on oil exports when prices exceeded a benchmark level. The new law referenced the government's responsibility to 'defend the natural heritage of the country and preserve the sustainable growth of the economy, as well as balanced, equitable development for the collective good.'[xvi] While the move was well received by citizens, oil companies and the Chamber of Manufacturers of Pinchincha challenged the law in Ecuador's Constitutional Court. The Court however confirmed the constitutionality of the amendments.

In October 2007, the administration of newly elected President Rafael Correa increased the tax to 99 percent. Correa declared in a public radio address that oil companies had three options: comply with the windfall tax, agree to transfer the existing contract into a service contract, or divest their assets. Correa's primary goal was to convert existing contracts into service contracts to regain government control over oil exploitation and revenue.[xvii] US-based companies Murphy and Burlington and French company Perenco refused to comply and instead brought treaty claims. This, however, did not prevent Correa from seizing Perenco and Burlington's oil, which was auctioned to pay the company's debt that accrued due to the windfall tax. A tribunal under ICSID, where the Perenco's claim was taken, ordered Ecuador to refrain from taking such action until the cases were resolved. The government, however, responded by asserting 'Law 42 and its implementing Decrees…were enacted at the highest levels of government... Under the circumstances, Law 42 must be applied and enforced, lest the integrity of the legal order be undermined.'[xviii] Burlington and Perenco then suspended operations to which Ecuador again retaliated by terminating their contracts and seizing control of the area.

Correa was elected in November 2006 with the support of a broad-based political movement, Alianza Patria Altiva y Soberana (Proud and Sovereign Fatherland), winning 56.7 percent of the vote in the second round (Conaghan 2008: 47). A US-trained economist, Correa served under Palacio as the Minister of the Economy and gained popularity for his opposition to neoliberalism and calls for renewing state sovereignty. He denounced the existing party structure as exclusive and corrupt and as feeding the interests of the business establishment. His political campaign to institute a 'Citizen's Revolution' and '21st Century Socialism' involved reforming state institutions and enacting greater cultural rights for the indigenous. This earned him populist appeal and a majority government, a rarity in a country where leaders were often impeached (Ibid).

A long-running dispute between US oil giant Chevron and residents of Lago Agrio in the Amazon came to a head amid Correa's rise to power. In 2006, Chevron introduced a claim under UNCITRAL arbitral rules alleging that Ecuador violated BIT provisions on fair and equitable treatment in failing to deal fairly and timely with multiple breach-of-contract lawsuits levied against it by its subsidiary, Texaco Petroleum in the 1990s. The timing of Chevron's claim was widely criticized as an attempt to pressure the government to intervene in a class action lawsuit brought against it in US courts by Lago Agrio residents. In the class action suit, residents alleged that Texaco dumped 18 billion tons of waste in the rainforest, resulting in severe environmental damage, cancers, birth defects and miscarriages in surrounding communities. Chevron challenged the claims on the grounds that the case should be heard in Ecuador. The judge agreed and proceedings were taken up in Ecuador in 2003. The Palacio government had refused to intervene in the proceedings. The Correa government threw its support behind Lago Agrio residents (Diaz 2009).

In September 2009, Chevron filed another arbitral claim accusing the government of unfairly favoring its citizens in violation of the BIT provision on fair and equitable treatment. Chevron requested relief from the almost $US9.5 billion awarded to Lago Agrio in the class action suit. In January 2011, the tribunal ordered Ecuador to 'take all measures necessary to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the *Lago Agrio* case.'[xix] The government refused and an Ecuadorian court confirmed that the ICSID tribunal had no power to compel the government to violate its obligations to Lago Agrio residents (Johnson 2012).

Correa's refusal to abide by tribunal orders reflected his desire to reassert state sovereignty surrendered to international institutions. Policymakers were particularly skeptical of ICSID because of its affiliation with the World Bank and the historic influence of the United States over that institution.[xx] In December 2007, Correa notified ICSID that Ecuador did not consent to arbitration for disputes concerning natural resources (Cadena and Montañes 2007: 154). ICSID arbitrators ruled the notice had no force and effect.[xxi] Ecuador then announced that contracts with oil companies would be considered void unless ICSID was removed as a venue for arbitration over contractual matters. Chile's Centre for Arbitration and Mediation (CCAM) has since been included in new oil contracts as an alternative (Diaz 2008: 6). The CCAM was chosen because officials believed such proceedings would be conducted more fairly in a Latin American institution that was less susceptible to Western influence. In 2008, Correa also denounced BITs with El Salvador, Cuba, Guatemala, Honduras, Nicaragua, the Dominican Republic, Paraguay, Uruguay and Romania with widespread support in the National Assembly.

Ecuadorian business groups protested the decision, arguing that it would scare away needed investment. However, officials argued that the agreements failed to bring significant economic benefits and exposed the country to undue risk.[xxii]

Correa conducted an extensive outreach campaign, chastising oil companies, their legal representatives and international arbitrators through radio addresses and televised appearances.[xxiii]A new Constitution adopted in 2008 provided the legal basis for Ecuador's withdrawal from international arbitration. Article 422 of the Constitution prevents the government from ceding sovereign jurisdiction to international arbitration entities outside of Latin America. This provision is, in part, a manifestation of the widespread dissatisfaction with arbitral rulings and highly publicized battles with oil companies. Correa denounced the ICSID convention as a violation of Article 422, again with widespread congressional support, and requested approval from the National Assembly to terminate additional BITs that granted ICSID jurisdiction. The National Assembly returned this request on the grounds that it required a prior ruling from the Constitutional Court (Gómez 2012: 462-463). The Constitutional Court confirmed that most BITs violated Article 422 and granted authority to denounce them. Correa, however, terminated only two BITs (with Germany and Romania) while maintaining others, including that with the United States under which most investor claims have been brought. Some policymakers argued that the agreement provided economic benefits despite the risks of investment disputes.

Successive losses in ISDS proceedings fed public debate. In March 2010, Chevron was awarded US$ 96 million over the breach-of-contract cases. In October 2012, Occidental's was awarded US$1.77 billion for its second claim, although this was later reduced to US$1.016 billion following an annulment ruling. Arbitrators in the Occidental case found that although Ecuador acted in accordance with its legal rights in terminating Occidental's contract, failing to compensate the firm was a disproportionate response. The ruling was remarkable in terms of the amount awarded and the tribunal's willingness to exert judgment over what constituted an appropriate government response to a breach of domestic law. The awards ignited calls for a further termination of BITs. Correa, however placed the termination on hold pending recommendations from a Citizen's Audit Commission. Correa's hesitancy to terminate its BIT with the United States reflected tensions in his development strategy. Extractivism was central to Correa's modernization project as revenue derived from oil profits funded the expansion of social and development programs. The government is also heavily dependent on foreign capital and technologies to exploit its oil resources and welcomed foreign companies despite opposition from indigenous and environmental groups. These dependencies contributed to the government's reluctance to terminate BITs with large economic partners.

Correa established the Citizen's Audit Commission in October 2012 to assess the constitutionality of remaining BITs and their impacts. In line with Correa's commitment to enhance political inclusivity, the Commission brought together foreign experts, government officials and civil society representatives. Its members, however, were appointed and are known for being highly critical of BITs and ICSID. In their 2017 report, the Commission advised the cancelation of remaining BITs and the negotiation of new agreements that provide for state-state dispute resolution, investor obligations, and narrow the scope of key provisions (CAITISA 2017). Shortly before the 2016 elections, Correa announced the termination of Ecuador's remaining BITs. Legislators believed that as it stood, 'there is no room for advancing progressive social and political objectives under the current investment legal regime'.[xxiv]

Like the Kirchners, Correa strengthened commercial ties with nontraditional partners including China, Russia and Iran, countries perceived to be less likely to interfere in the articulation of Ecuador's sovereignty (Conaghan 2008: 56). Ecuador is one of the largest recipients of Chinese investment in Latin America and Chinese firms have become some of the largest players in its oil and gas industry (ECLAC 2013: 11). This reduced the country's dependence on US investment. Correa also led regional initiatives aimed at reforming ISDS and enhancing inter-state cooperation on investment-related matters. Correa first proposed the establishment of UNASUR's arbitration center and established an alliance with Bolivia, Cuba, Nicaragua, Venezuela and several Caribbean countries to encourage information sharing on investor-state disputes (Third World Network 2013). The government also developed a new model BIT entitled *Investment for Development Agreement,* which excludes ISDS and recognizes the supremacy of human rights and environmental and labor standards. This model will inform future negotiations on investment treaties and many of its standards are reflected in a free trade agreement Ecuador recently signed with the European Union, Peru and Colombia.[xxv] The Correa government was therefore not opposed to investment protection in principle but rejects the supremacy of international law and the notion that investor property rights should usurp its development goals.

Ecuador won one of eight cases involving foreign oil companies and was found liable for damages in five cases. Awards rendered to oil companies currently amount to over 1.610 billion, not including interest, legal representation and the administrative fees of arbitral institutions.[xxvi] Despite Correa's combative rhetoric, the government agreed to pay awards after they were confirmed by annulment tribunals. Correa successfully convinced most oil companies to adopt service contracts and forfeit their right to ICSID arbitration over contractual matters. This combined with the windfall tax helped capture greater oil profits. Government revenue derived from the oil sector increased from US$ 2.211 billion in 2005 to US$8.675 billion in 2008, reaching a high of $12.935 billion in 2012 (Ministry of Finance 2013). The added revenue outweighed the costs of investor claims and funded the expansion of social and development programs.

Shaping the Legitimacy of BITs

Argentina and Ecuador's experience under BITs demonstrates that government orientations are informed by multiple, interacting factors that fluctuate over time. Competition for foreign investment and the desire to demonstrate credibility to the international community motivated governments in the 1990s to rush to BITs. This confirms what previous scholars have argued about the role these mechanisms play in BIT formulation (see Tobin and Rose-Ackerman 2011; Allee and Peinhardt 2010; Elkins, Guzman and Simmons 2006). However, it should be noted that the BITs were signed amid the adoption of neoliberal policy prescriptions (liberalization, privatization and deregulation). State officials had therefore subscribed to neoliberal economic philosophy and were likely to see BITs as an appropriate policy instrument. This normative basis provided a conducive environment for the proliferation of BITs.

Over time, concerns of economic competition and credible commitment signalling were outweighed by domestic considerations. Governments in Ecuador and Argentina introduced policies they knew were likely to infringe on BIT obligations, but did so because they perceived such policies were necessary to meet public and political interests. Economic crises had drastically eroded the strength and political influence of internationally-oriented business elites and elevated the voices of the poor and marginalized. Widespread social mobilization, which resulted in the downfall of previous governments, demonstrated that officials could not favour foreign capital to the neglect of citizen demands and expect to retain their positions. Thus, civil society demands and the need to protect impoverished communities' access to basic services outweighed BIT obligations in the decision-making of the Duhalde government, leading to the introduction of the emergency measures. Similarly, in Ecuador civil society demands drove the Palacio government to adopt policies aimed at capturing a greater oil profits despite the treaty rights of foreign-owned oil companies. This suggests that governments will take on these costs if they believe it necessary to advancing public and political interests.

Once they came to power, the left-leaning administrations of the Kirchners and Correa adopted a strict stance toward investors and adopted strategies aimed at mitigating their costs. Yet, their different approaches are notable. Despite having faced more claims than Correa, the Kirchners refused to terminate BITs and withdraw Argentina's membership from ICSID. Instead, the Kirchners aimed to incent foreign investors to drop their claims with new pro-poor contracts and exploited holes in enforcement mechanisms to delay payment of awards rendered. Conceding to foreign investors the ability to raise tariffs for industrial and wealthy sectors in exchange for commitments on lower rates for the poor allowed investors to maintain the viability of their investments while preserving a key policy goal. Maintaining BITs, however, means that Argentina did not reduce its exposure to future investor claims and, under Macri, Argentina is now deepening its commitments to investor rights.

The different approaches adopted by governments reflects variation in dominant political ideologies and state-society relations. The Kirchners rose to power with the support of workers and the poor and gained popularity because of their commitments to poverty alleviation and sound economic management. Yet, ideologically they did not represent a strong break from neoliberal norms; rather, they sought to soften the impacts of neoliberal policy on the poor. While state officials challenged the authority of ICSID because of suspected corporate bias, they believed costs of investor claims stemmed largely from the crisis conditions as opposed to the BITs themselves. Relatively few officials objected to BITs in principle. However, the Kirchners' progressive social agenda meant that the government was susceptible to citizen demands. For the most part, these demands were prioritized over the demands of foreign investors. Therefore, the Kirchner's selective adherence to, and limited contestation of, investment rules should be understood as an attempt to balance investor rights with citizen demands, particularly of the poor and marginalized.

Correa rose to power on his commitments to strengthen cultural rights and redesign state institutions to enhance political and economic inclusivity. His ideology, although also left-leaning, incorporated stronger reformist elements than that of the Kirchners. Officials objected to ICSID and BITs in principle, perceiving them to be extensions of corporate and Western interests. Successive investor claims and protest from internationally oriented business elites therefore failed to dissuade Correa from taking action against foreign investors and implementing regulatory changes that extended state control over oil profits. Redistributing wealth captured by oil companies therefore outweighed the importance assigned to investor demands. Terminating BITs, in turn, was perceived to be a necessary means of opening space for the further articulation of Correa's development strategy. The legitimacy of BITs was therefore internalized to a lesser extent than in Kirchners' administrations. However, recent attempts to negotiate more development-friendly investment treaties in Ecuador suggests that officials do not entirely reject limited investor rights so long as government regulatory space is protected.

It is important to note that in both cases, governments' bargaining position vis-à-vis foreign investors was greatly strengthened by strong domestic economic performance and the popularity of their leaders. Post-crisis economic recovery reduced their economies' dependence on foreign investment and gave confidence to state negotiators. Social opposition to foreign investors also meant that officials could take a hard-lined approach without fear of political reprisal. Yet it also reduced the concessions officials could offer to foreign investors to arrive at a settlement. This supports the importance that Simmons (2014) assigns to economic performance in shaping government orientations. It also should be noted that the availability of alternative economic partners enhanced governments' abilities to lessen the impacts of economic sanctions introduced by investor home-states. Ideological beliefs therefore were not the only determining factor, but rather shaped the extent to which policymakers were willing to challenge existing rules relative to other factors, like interest group pressure, domestic economic performance and economic competition.

Governments are not passive recipients of international rules. Rather, they will introduce policies that infringe on international rules to advance public and political interests. BITs increase the costs of introducing policies against the interests of foreign investors, but governments adopt strategies to mitigate these costs with some success. This suggests that the constraints international rules place on government action will vary across time and place according to domestic conditions. Civil society activism may prompt governments to infringe on international agreements, particularly where domestic economic performance insulates officials from the pressures of global economic competition and economic sanctions. However, these cases suggest that reform-oriented governments are necessary to transfer social activism into material and substantive shifts in the articulation of international rules.

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[i] Claims were brought under Argentina's BITs with France, Spain, the United States, the United Kingdom, Belgium and Luxembourg, and Italy. Claims against Ecuador were brought under BITs with the United States, France and Canada.

[ii] Interview with Former state attorney, Buenos Aires, 23 April 2014.

[iii] Interview with former members of the State Attorney General Office and Representatives in several of the cases, Buenos Aires, 23 April 2014.

[iv] These include EDESU, AES, Pioneer National Resources, Camuzzi, Gas Natural Ban, EDENOR, Unysis, Aguas Cordobesas, Telefonica de Argentina, Telecom and Saur (Stanley 2006).

[v] Interview with former state attorney, Buenos Aires, 28 April 2014.

[vi] This was the consensus amongst bureaucrats and state lawyers interviewed.

[vii] Interview with government official, Ministerio de Relaciones Exteriores y Culto, Buenos Aires, April 23, 2014.

[viii] According to awards published online through italaw.com. Accessed 20 September 2017.

[ix] Interview with former state attorney, Quito, 9 October 2014.

[x] Interview with former state attorney, Quito, 16 October 2014.

[xi] According to interviews with former state representatives, Quito, Ecuador, October 2014.

[xii] *Occidental Exploration and Production Company v. Republic of Ecuador,* Award, London Court of International Arbitration (LCIA), Case No. UN3467 (1 July 2004).

[xiii] *Encana Corporation v. Republic of Ecuador*, Award, LCIA, Case No. UN3481 (3 February 2006) at 49 – 50.

[xiv] *Occidental Petroleum Corporation v. Republic of Ecuador*, Award, ICSID, Case No. ARB/06/11 (October 5, 2012) at 65

[xv] *Burlington Resources Inc. v. Republic of Ecuador*, Award, ICSID, Case No. ARB/08/5 (14 December 2012) at 13 - 18.

[xvi] *Perenco Ecuador v. Republic of Ecuador*, Decision on Liability, ICSID, Case No. ARB/08/6 (12 September 2014) at 25.

[xvii] *Burlington v. Ecuador*, at 19.

[xviii] *Perenco v. Ecuador*, at 49.

[xix] *Chevron Corporation v. Republic of Ecuador*, Decision on Interim Measures 266-2, Permanent Court of Arbitration (PCA), Case No. 2009-23 (October 10, 2011) at 3.

[xx] Interview with Luis Guamangate, National Assembly Member, 8 October 2014.

[xxi] See *Murphy Exploration v. Republic of Ecuador*, Decision on Jurisdiction, ICSID, Case No. ARB/08/4 (December 15 2008) at 86.

[xxii] Interview with Adrián Cornejo, Secretaría Nacional de Planificación y Desarrollo, Quito, October 14, 2014.

[xxiii] Interview with corporate lawyer, Quito, 23 October 2014.

[xxiv] Interview with Luis Guamangate, Ecuador National Assembly, 8 October 2014.

[xxv] Interview with Adrián Cornejo, National Secretariat of Planning and Development, Quito, 14 October 2014.

[xxvi] According to awards published online through italaw.com. Accessed 20 September 2017.